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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ O.M.P.(I)(COMM.) 240/2018

PAPCEL A.S. AND ANR. ..... Petitioners

Through: Mr Manu Beri, Mr Gajendra Khichi and Mr Raghvendra Pratap Singh, Advocates.

versus

NEPA LIMITED ..... Respondent

Through

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **31.05.2018**

<u>IA No.7784/2018</u>

1. Allowed, subject to all just exceptions.

<u>O.M.P.(I)(COMM.) 249/2018</u>

2. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia,* praying as under:-

> "(a) Restrain/Injunct the Respondent Company, its officers, agents, servants etc. from invoking and encashing the Advance Bank Guarantee No.0027FBG150005 and Security Deposit Bank Guarantees No.0027FBG150006, 0027FBG150007 and 0027FBG160003 with Axis Bank furnished by the Petitioner No.1 Company that are valid till 30.06.2018.
>
> (b) Restrain/Injunct the Respondent Company, its officers, agents, servants etc. from further seeking extension of

the said Advance Bank Guarantee No.0027FBG150005 and Security Deposit Bank Guarantees No. 0027FBG150006, 0027FBG150007 and 0027FBG160003 with Axis Bank furnished by the Petitioner No.1 Company that are valid till 30.06.2018.

(c) ex-parte ad interim order in terms of prayers (a) to (b) above."

3. The respondent company had issued a Notice Inviting Tender (NIT) on 11.08.2014 for a contract for design, engineering, manufacture, assembly and supply of all systems/equipment, unloading at site, placing at a storage area, unpacking of packing cases and removal of packing materials from the place of erection, shifting of goods from the storage to the place of erection, test at manufacturer's work, supply, erection and supervision of erection, commissioning, performance/acceptance test and onsite training of the personnel of the Respondent Company.

4. Petitioner no.1 – a company incorporated under the laws of Czech Republic – submitted its bid on 12.11.2014 pursuant to the aforesaid NIT which was accepted and the parties entered into a contract for the work in question.

5. The aforementioned bank guarantees were furnished by Petitioner no.1 pursuant to the contract. It is the petitioners' case that the petitioners are performing the contract but the project has been stalled due to lack of availability of funds with the respondent. The petitioner claims that the respondent owed approximately a sum of ₹17 crores to the petitioner which includes approximately €6,23,385 towards imported deliveries. He states that the respondent is neither pursuing with the works nor has released the bank guarantees furnished by Petitioner no.1.

6. The learned counsel appearing for the petitioners states that after the petition was filed, the respondent sent an email requesting the petitioner to extend the bank guarantees in question. He submits that the petitioners have to unnecessarily suffer charges for the same which, in the given circumstances is not warranted. It is seen that the bank guarantees in question are unconditional bank guarantees and, therefore, notwithstanding the controversy between the parties, this Court is not persuaded to accept that the invocation of these bank guarantees ought to be interdicted. The law relating to the bank guarantees is well settled. In ***Svenska Handelsbanken v. M/s. Indian Charge Chrome and Others: (1994) 1 SCC 502,*** the Supreme Court had held that a confirmed bank guarantees/irrevocable letters of credit, cannot be interfered with unless there is fraud and irretrievable injustice. The court had further qualified the case of fraud to be one of an established fraud.

7. There is also a long line of decisions rendered by the Supreme Court repeatedly clarifying that the unconditional bank guarantees cannot be interdicted pending the resolution disputes between the contracting parties (See: ***Hindustan Construction Co. Ltd. v. State of Bihar & Ors: (1999) 8 SCC 436***).

8. In view of the above, the relief as prayed for cannot be granted.

9. As informed by the learned counsel appearing for the petitioners, the respondent has not invoked the bank guarantees but has merely asked petitioner no.1 to extend the same. This Court is also informed that the bank guarantees in question are valid till 30.06.2018. In these circumstances, it would be open for the petitioners to invoke the arbitration clause and seek appropriate remedies before the Arbitral Tribunal.

10. The petition is disposed of with the aforesaid observations.

VIBHU BAKHRU, J

MAY 31, 2018

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